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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WOLFE AIR AVIATION, LTD. et al., Cross-Complainants and Respondents, v. STORM BARTLING et al., Cross-Defendants and Appellants.	B151940 x-ref. B119498 (Los Angeles County Super. Ct. No. GC 016364)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kim G. Dunning, Judge. Affirmed.

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Stone, Rosenblatt & Cha and John S. Cha for Cross-Defendant and Appellant Storm Bartling.

Breidenbach, Huchting & Hamblet, Gary A. Hamblet, Josephine M. Chow and Marisa A. Tostado for Cross-Defendant and Appellant Andreini & Company, Inc..

Sheppard, Mullin, Richter & Hampton, Andre J. Cronthall and Mary E. Gram for Cross-Complainants and Respondents Wolfe Air Aviation, Ltd., Cine/Exec Aviation, Inc., Cine/Exec Helicopters, Inc., Fleet Unlimited, Inc. and Patty Wolfe.

Wolfe Air Aviation bought aviation liability insurance to cover its commercial helicopters. Wolfe bought the insurance through insurance broker Storm Bartling, who worked for insurance broker Andreini and Co. Wolfe financed the premium through a loan from an industrial loan company (Imperial), which paid the insurer the full premium price. Wolfe then repaid the loan company in installments. Wolfe made its payments to Andreini, which then paid the loan company. Bartling coordinated the account to assure Wolfe's payments to the loan company were current, and made periodic changes in the policy to reflect deletion of one helicopter from coverage and the corresponding reduction in the amount due. Bartling did all this as part of his long relationship with Wolfe as Wolfe's primary insurance broker, for which Bartling received commissions on Wolfe's policies.

The loan company decided that Wolfe was behind in its payments. The loan company sent Wolfe and Andreini notice of the delinquent amount. As permitted under the policy, the notice stated that if the delinquency was not cured by a specific future date, the loan company would cancel the policy. Neither Wolfe nor Andreini made the payment and the loan company canceled the policy. Wolfe had enough money or credits in its Andreini account to pay the alleged delinquency, and thus thought the notice was incorrect. Wolfe contacted Bartling to have him correct the problem, demanded an accounting, and relied on Bartling to pay the bill, negotiate the amount with the loan company, or request additional money if more was needed. Bartling did none of those things. Instead, he sent Wolfe a letter stating that Wolfe's policy was "in order." Twenty hours after the policy lapsed, one of Wolfe's helicopters crashed, killing or injuring those on board and exposing Wolfe to liability.

The insurer initially defended Wolfe under a reservation of rights and settled the claims against Wolfe. The insurer then sued Wolfe, among others, for a declaration that the policy had lapsed, and it owed Wolfe no duty to defend, did not act in bad faith in reserving its rights, and was entitled to reimbursement from Wolfe for representation and settlement. Earlier, we agreed with the insurer, ordered judgment entered in its favor, and remanded for the trial court to determine the amount of reimbursement Wolfe owed it. (*Associated Aviation Underwriters, Inc. v. Wolfe Air Aviation, Ltd.* (Jul. 14, 1999) B119498 [non-pub opn.].)

The case then went to trial on Wolfe's cross-complaint against Andreini and Bartling (collectively, defendants) for professional negligence, and fiduciary duty and contract breaches. The jury returned a nearly $10,000,000 verdict on all Wolfe's causes of action. Defendants appeal from the ensuing judgment.

Defendants contend (I) insufficient evidence supports any of Wolfe's causes of action, and, in any event, the court should have offset the award by Wolfe's 30% comparative negligence found by the jury; (II) insufficient evidence of causation supports Wolfe's damages; and (III) the damages must be reduced because of trial court error, bias, and Wolfe's attorney's misconduct.

We reject defendants' claims and affirm the judgment.

FACTS

As noted in our earlier opinion, Wolfe's aviation liability policy became effective September 19, 1994, and was to have run for a year. However, pursuant to the loan company's December 29, 1994, notice of intent to cancel, the policy lapsed at 12:01 a.m. on Saturday, January 14, 1995, when neither Wolfe, Andreini, nor Bartling responded to the notice. Wolfe's helicopter crashed about 8:00 p.m. on January 14, 1995, about 20 hours after the policy lapsed. "Wolfe reported the crash to [the insurer] immediately. [The insurer] began adjusting the claim on January 14, and continued to do so on Sunday, January 15, and Monday, January 16, which was the Martin Luther King, Jr., holiday. [¶] On Tuesday, January 17, the next working day after the cancellation date and the crash, Imperial sent Wolfe and Andreini . . . a" notice of cancellation stating that Imperial instructed the insurer to cancel the policy at 12:01 a.m. on January 14, 1995, based on the default under the loan payment terms. (*Associated Aviation Underwriters, Inc. v. Wolfe Air Aviation, Ltd., supra*.) Also on January 17, Imperial sent the insurer a cancellation notice dated the same day with an effective date of 12:01 a.m. on January 14.

The issue in this case was who, as between Wolfe and Andreini/Bartling, was responsible for the failure to timely respond to the December 29, 1994, notice.

Wolfe was a profitable and growing company. Wolfe owned a fleet of helicopters and Lear jets which it leased for various purposes. Wolfe's primary business was in aerial cinematography and photography for aircraft manufacturers and airline companies. Wolfe produced the film and still photos its clients used to develop, produce, and market their products and services. Wolfe obtained exclusive rights to the best technology for that business and modified its fleet to install the equipment. Wolfe's gross revenue from aircraft operations more than doubled from 1993 to 1994, from $780,000 to over $1.7 million. Wolfe invested its increasing profits in the early 1990's into its business, renovating several of its Lear jets at over $1,000,000 each, buying out a former partner for nearly $1 million, and buying and updating a Pasadena film stage production facility for over $2,000,000.

During 1994 and early 1995, Wolfe did much business for McDonnell Douglas and Boeing. Wolfe charged the former $14,000 per day and the latter $25,000 per day. Wolfe was negotiating to make one of its planes and crews available to Boeing full-time.

Wolfe's profit margin on its work for aircraft manufacturers was 40-41%.

Bartling had been Wolfe's aviation insurance broker since the mid-1980s. Bartling had worked at several different brokerage companies, and began working at Andreini in 1994. Bartling held himself out as an expert in the field. Bartling and Wolfe agreed that Bartling would negotiate and obtain aviation insurance for Wolfe. Because Wolfe's fleet periodically changed, aircraft were added and deleted from its policies. Bartling supervised Wolfe's aviation (and some other types of) insurance policies, monitoring payments, adjusting amounts due, and negotiating refunds or increases based on the number of covered aircraft. When Wolfe received notices of intended policy cancellations, which he did many times over the years, Wolfe contacted Bartling and relied on Bartling to resolve the problems, maintain coverage, and account for Wolfe's funds. Bartling always did so until the loss of coverage at issue here. Bartling knew Wolfe relied on him to perform this work accurately and timely.

Bartling told Wolfe that a notice of intent to cancel from a lender as opposed to the insurer would not trigger coverage loss, and that even a notice from the insurer would not do so without a grace period in which any delinquency could be cured. Bartling also agreed to and did monitor Wolfe's policies, premiums, coverage, and payment timeliness to insure Wolfe always was covered. In exchange for Bartling's work and expertise, Wolfe made Bartling its exclusive broker. Bartling received commissions on Wolfe's total policy premiums.

In September 1994, Wolfe's $25 million aviation liability policy was due for renewal. On September 14, 1994, Bartling prepared a proposal for Wolfe discussing the policies offered by six insurers, and recommending that Wolfe choose the Associated Aviation Underwriters (AAU) policy and finance the premium with Imperial Premium Finance, with the policy and loan agreements to be effective September 19, 1994. Wolfe agreed. Under the loan agreement, Wolfe was to pay a $28,491 down payment, finance $113,966, and make nine monthly installment payments of $13,030. Bartling told Wolfe it would be receiving a $10,000 credit from AAU, and thus only needed to pay $18,491 as the down payment. Bartling told Wolfe it would receive monthly installment notices directly from Imperial, and the first installment would be due October 19, 1994. Bartling also told Wolfe there was a 45 day grace period from AAU, ending November 3, 1994, during which Wolfe would be covered even if it had not yet paid for the insurance. Bartling sent Wolfe a copy of the agreement on September 23, 1994, and Dan Wolfe signed for Wolfe on September 27, 1994. AAU issued the policy effective September 19.

Within the next two weeks, Wolfe's former partner asked Bartling to delete the partner's helicopter, the most expensive of Wolfe's fleet to insure, from Wolfe's policy, and obtain a separate policy for the partner's helicopter for which the partner would pay. Bartling did so. Bartling told Wolfe the partner's helicopter was off Wolfe's policy effective September 19, 1994. Bartling told Wolfe that deleting that helicopter would reduce Wolfe's total premium by about 30%. Bartling told Wolfe the existing loan would be voided and replaced by a new loan so reflecting, which Bartling would send to Wolfe.

On October 19, 1994, the date the first monthly installment payment was due under the old loan, but having received nothing from Bartling regarding the new loan terms, Wolfe wrote a check to Andreini for $31,521, reflecting the original net down payment and the first $13,030 installment under the old loan. Wolfe telephoned Bartling and told him it was sending the check although the new accounting and loan had not been received. Bartling told Wolfe not to send the check because it would result in a large premium overpayment. Bartling promised the new loan agreement soon and reassured Wolfe it still was within the 45 day grace period. Wolfe voided the check.

On November 1, 1994, Andreini sent Wolfe a revised schedule endorsement showing the deletion of the former partner's helicopter and a return premium. Wolfe did not understand the document because it thought the reduction should have been more.

On November 3, 1994, the last day of the 45 day grace period Bartling had told Wolfe existed, and still not having received the new loan agreement from Bartling, Wolfe sent Andreini a $28,491 check, the full amount of the down payment under the original loan agreement. Wolfe did so to assure it retained coverage, although it knew its actual down payment would be less, it had at least a $10,000 credit at Andreini, and the payment would increase its credit balance.

On November 7, 1994, Bartling signed a revised loan agreement with Imperial. The new agreement lowered Wolfe's down payment to $20,625, the amount financed to $82,501, and the nine monthly installments to $9,433. Bartling's assistant prepared the new loan agreement by telephoning Imperial, receiving the figures, and writing them into a blank Imperial finance contract Andreini had on hand. Unlike the first, now voided, Imperial/Wolfe loan contract, and contrary to Andreini's normal practice, Bartling did not show or discuss the second agreement with Wolfe before signing it. Moreover, Bartling signed the second agreement not only as Wolfe's broker, but also for Wolfe, again without Wolfe's knowledge or consent. After receiving the second agreement, Imperial requested that Andreini obtain Wolfe's original signature. However, Bartling told his assistant to obtain Imperial's waiver of the signature. Wolfe did not see the new agreement until after AAU canceled the policy, and would not have signed it because Wolfe thought the figures were wrong.

Also on November 7, Andreini sent Wolfe an invoice stating the total premium would decrease by $39,331 because of the deletion of the former partner's helicopter. This reduction was $5,000 less than the $44,000 premium for the deleted helicopter.

Andreini never explained the discrepancy to Wolfe. Contrary to its practice, Andreini did not notify Wolfe how the reduction would be refunded, credited, or applied to future payments.

As of November 7, 1994, Wolfe had paid or been credited $43,405 in its Andreini account toward the total owed for its aviation liability insurance. Without informing Wolfe, Bartling instructed the Andreini staff to use those funds to pay the down payment and October and November monthly payments under the second loan agreement. Andreini did so, issuing its own check. Thus, contrary to the language in both agreements, Wolfe did not receive invoices for, or pay, either the October or November 1994 payments. All Wolfe's payments until AAU cancelled the policy were made to Andreini, not to AAU or Imperial.

Andreini's accounting department decided to treat the two monthly payments as though they were part of the down payment. The effect was that Andreini requested a check from Imperial for only $63,634, not the $82,501 to be borrowed under the second loan agreement. Thus, although Wolfe had borrowed, and was paying interest on, $82,501, Andreini had only $63,634 of those funds. Andreini did not notify Wolfe of any of these transactions, nor ask Wolfe how its additional $19,000 should be applied or credited. The $19,000 credit remained in Wolfe's account with Andreini, over which only Andreini, not Wolfe, had check-writing authority.[1] Andreini nonetheless claims it properly accounted for Wolfe's payments and that there was no unaccounted for money.

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1 At oral argument, defendants conceded that Wolfe's payments and credits on all its policies were commingled in a single account with Andreini, although separate balances were computed for each policy. While strenuously maintaining that the $19,000 was not actual cash deposited in Wolfe's Andreini account, defendants did not dispute that the effect of these transactions left Wolfe with a $19,000 credit toward Wolfe's total debt to Imperial whether that credit should have been recorded by Imperial, Andreini, or both. Substantial evidence supports this conclusion.

Meanwhile, Andreini and Bartling split the $10,000 commission received for Wolfe's policy.

On November 14, 1994, Imperial sent Wolfe a notice of acceptance, which listed the same down payment, amount borrowed, and nine monthly payments, beginning October 19, 1994, contained in the second loan agreement (which Wolfe did not see until after the crash and lapse of insurance.) The notice stated Wolfe would receive invoices for the nine monthly payments. The notice confused Wolfe, which had not received October or November invoices. Wolfe repeatedly contacted Andreini and Bartling, requesting the previously promised accounting, but never got a response. Wolfe's accounting department unsuccessfully tried to decipher the notice on its own.

On December 2, 1994, Imperial sent Wolfe the first monthly invoice, stating the December $9,433 payment was due by December 19. The failure to pay this invoice led to the December 29, 1994, notice of intent to cancel; the failure to respond to the December 29 notice led to the cancellation of the policy effective 20 hours before the crash. Wolfe knew it had substantially overpaid the amounts due, assumed the invoice was in error, and assumed Bartling would have responded to its inquiries if additional money was due.

On December 9, 1994, at a social dinner, Bartling brought Dan Wolfe a refund check for nearly $4,000, which Bartling thought brought Wolfe's account into balance. Wolfe, who then was in good financial condition, told Bartling, who was experiencing financial difficulties, to keep the check, which Bartling did. Sometime later, Bartling repaid Wolfe the money. Bartling said nothing about the status of Wolfe's Andreini account or any need to pay the December 2 invoice. Bartling agreed that Andreini was obligated to account to Wolfe for its payments and to ask whether overpayments should be applied to future bills or refunded.

On December 29, 1994, Imperial sent Wolfe and Andreini the notice of intent to cancel. The notice stated the December payment was overdue, interest charges had been added, and the policy would be canceled effective 12:01 a.m. on January 14, 1995, unless payment was received before then. Wolfe immediately and repeatedly telephoned Andreini and Bartling, seeking an accounting and explanation. As noted, Wolfe believed it had substantially overpaid its insurance costs to date, but was willing and able to pay more if necessary. Because Wolfe thought it had overpaid to date, Wolfe decided not to pay the December 29 late bill unless Andreini or Bartling told them an additional payment was due. Wolfe's controller finally spoke to Bartling in early January and requested an urgent accounting. Bartling said he would take care of it. Later, on January 9, 1995, Wolfe received a copy of the policy and a cover letter from Bartling stating that Wolfe's aviation coverage was "'in order.'" Bartling said that he wrote the letter without checking with Imperial or Andreini's accounting department regarding Wolfe's account. During this same time, Bartling cleared up a problem with Wolfe's workers compensation insurance.

Pursuant to her usual practice, Bartling's secretary placed the December 29 notice in Bartling's in-file, then filed it a week later. Bartling claimed he did not know of the notice until after the crash, but his secretary recalled that Bartling called her at home immediately after learning of the crash and asked her if the deadline had passed.

After the crash, Wolfe continued to believe its aviation insurance was in force, and it performed a job for McDonnell Douglas on January 17, 1995. On the same day, Wolfe, still believing it had overpaid and its insurance was in force, nonetheless federal expressed a check for the amount of the December 29, 1994, delinquency notice to Andreini. Andreini mailed the check to Imperial, but did not otherwise contact Imperial that day. Also on that day, Bartling told Wolfe that the insurer, pursuant to instructions from Imperial, was canceling the policy effective 20 hours before the crash.

On February 16, 1995, Wolfe received its first accounting from Andreini about its aviation liability insurance account. After paying off the interest and fees on the Imperial loan, Andreini refunded nearly $10,000 to Wolfe. The accounting did not mention the $19,000 difference between the loan amount and cash on hand.

On January 18, 1995, copies of AAU's January 17 cancellation notice were sent to all Wolfe's lien holders and insurance certificate holders, including all Wolfe's customers who required Wolfe to have insurance as a condition of doing business. Wolfe immediately and vigorously disputed the cancellation. That dispute continued until our July 14, 1999, opinion conclusively held that the cancellation was effective, and that Wolfe had no coverage at the time of the crash. Wolfe continued to assure clients it had coverage, but the cancellation notice and AAU's denial of coverage convinced Wolfe's clients to the contrary. Wolfe obtained replacement insurance effective January 23, 1995, at a $33,000 premium increase over the AAU policy.

As a result of the crash, the FAA revoked and then suspended Wolfe's required 135 certificate. Wolfe later had the suspension overturned, but did not reacquire the certificate. As a result, Wolfe had to lease its aircraft to operators who had the certificate. The leases generated revenue, but less than would have been earned if Wolfe had been able to use the aircraft for Wolfe operations.

According to its May 25, 1995, letter to Wolfe, McDonnell Douglas refused to hire Wolfe for any research and development projects after February 1995 because of the uncertainty over Wolfe's insurance status. The letter acknowledged that McDonnell Douglas was forced to hire Wolfe's competitor although Wolfe's work product was far superior. Likewise, Wolfe lost the potential Boeing contract to base a Wolfe plane with Boeing full time. Boeing executives agreed Wolfe lost this contract because of its lack of insurance. Boeing believed Wolfe was the only company capable of meeting its needs. Boeing and McDonnell Douglas acknowledged additional concern about Wolfe's loss of the 135 certificate.

Wolfe's gross income from aircraft operations peaked in 1994 at $1.726 million and declined steadily to $820,000 in 1998. Dan Wolfe testified the loss of insurance was the only reason for the decline. As a result of the revenue decline, Wolfe had to sell one of its Lear jets for $600,000 below its value, losing the $700,000 it had invested in modifications. Wolfe's economist testified Wolfe's lost profits were $2.791 million from McDonnell Douglas, $1.735 million from Boeing, and nearly $1.1 million from Dan Wolfe Productions, a Wolfe subsidiary.

The business reverses forced Mr. and Mrs. Wolfe, and one Wolfe business entity, into bankruptcy for the first time. These bankruptcies resulted in $300,000 in legal fees. In addition, the Wolfes lost a $400,000 planned retirement home, a $150,000 Pasadena second home, and the $2 million Pasadena production studio to foreclosure.

Wolfe's expert opined that, because Andreini and Bartling held themselves out to Wolfe as aviation insurance experts; told Wolfe that only the insurer, not the loan company, could cancel a policy, and then could do so only after an additional grace period; accepted, monitored, and disbursed Wolfe's funds, but failed to do so after the December 29, 1994, notice of intent to cancel; failed to provide the requested accounting or show Wolfe the second loan agreement until after the crash; replied to Wolfe's post-December 29, 1994, requests for an accounting with a letter stating that Wolfe's insurance was "in order;" failed to institute procedures to avoid the notice's filing before it clearly was addressed; and failed to intervene with Imperial and AAU after the crash to assure coverage, Andreini and Bartling were negligent and breached their duties to and contract with Wolfe.

Andreini's and Bartling's expert agreed that if they agreed to hold and disburse Wolfe's funds, explained the terms of the policy, loan, and conditions under which lapse could occur to Wolfe, monitor the policies and intervene to prevent lapse, and provide accurate accounting upon request, but failed to accurately and correctly do so, they had breached duties to Wolfe.

Shortly before trial, AAU and Andreini/Bartling settled their claims against each other. As part of that settlement, AAU assigned Andreini/Bartling its $5.6 million judgment against Wolfe.

As noted, the jury returned verdicts for Wolfe on all three causes of action: professional negligence and breaches of duty and contract. The jury found Wolfe 30% comparatively negligent and awarded Wolfe $8,497,154 for lost profits, $923,438 for real property loss, $260,000 for personal property loss, and $265,374 for bankruptcy legal costs. The trial court ruled Wolfe could recover under all its causes of action without election, and without set-off for the AAU judgment or comparative fault. After deducting the $250,000 Imperial settlement, the court entered a net judgment for Wolfe for $9,695,966.

The court denied Andreini's and Bartling's JNOV and new trial motions.

STANDARD OF REVIEW

As the parties correctly agree, we review challenges to the sufficiency of the evidence, like those raised in sections I and II, under the substantial evidence test. In determining the sufficiency of the evidence, "a 'reviewing court is without power to substitute its deductions for those of the trial court.' . . . 'In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment . . . . "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*" [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.' [Citations.]" (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.) The testimony of a single witness, even a party, can be sufficient. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Likewise, a lay witness' testimony can be sufficient even if contradicted by expert testimony. "Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]" (*Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 171.) In applying this standard, we look at the whole record in the light most favorable to the judgment. "However, . . . substantial . . . implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with any evidence. It must be reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials which the law requires in a particular case." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336, internal quotes and citations omitted.)

The parties likewise correctly agree we review trial court evidentiary and other discretionary rulings under the abuse of discretion standard. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (*Ibid*, internal quotes and citations omitted.) Under that standard, "unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power. The burden is on the party complaining to establish an abuse of discretion . . . ." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331, internal quotes and citations omitted.)

Finally, the parties correctly agree we review purely legal issues de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

I

Andreini and Bartling contend insufficient evidence supports any of Wolfe's causes of action. Regarding the fiduciary duty breach claim, they contend insurance brokers/agents owe no duty to their clients greater than that of ordinary care, and thus that this cause of action is nothing more than a restatement of the professional negligence cause of action. Moreover, they claim that even if they owed Wolfe a greater duty, they did not breach it because they did not thereby benefit, a requirement for a breach of duty.

Regarding the professional negligence claim, Andreini and Bartling contend there can be no tort recovery for allegations such as these, which constitute at most only contract breach.

Regarding the contract breach claim, they claim there was no enforceable contract, because its terms were too vague and there was no consideration for any performance they promised.

Finally, Andreini and Bartling contend that even if sufficient evidence supports Wolfe's causes of action, the trial court erred in not offsetting the verdict by Wolfe's 30% comparative negligence established by the jury.

Andreini and Bartling argue several variations of the same theme in different contexts. They argue that Wolfe unquestionably received and was aware of the December 29, 1994, notice of intent to cancel, had been told it would receive and be obligated to pay monthly invoices after the down payment was made and the policy became effective, and chose not to pay it. As a result, Andreini and Bartling conclude they did nothing wrong, performed all acts required of them, breached no duty or contract, and Wolfe caused all its own resulting problems. They argue insurance agents generally are obligated only to obtain appropriate policies for clients and nothing more. They argue that generally, having insurance cancelled only exposes the former insured to potential liability, and later business losses cannot be said to be caused by the loss of insurance. They argue that even if they failed to perform as agreed and expected, Wolfe's independent comparative negligence reduces their culpability. All these claims are based on Andreini's and Bartling's characterization of the case as one involving, at most, their "not nagging [Wolfe] to pay [its] premium." These claims, which ignore many of the relevant facts, lack merit.

Wolfe responds that Andreini and Bartling unquestionably were Wolfe's agents, and, as such, they owed Wolfe a heightened duty, particularly because they held themselves out as experts and agreed, for a great deal of consideration, to perform additional duties beyond the minimal ones inherent in the insurance agency context. When they failed to perform as promised, they breached their duty to and contract with Wolfe, and committed professional negligence. Wolfe argues that comparative negligence does not apply to contract damages or damages caused by a breach of fiduciary duty.

Andreini's and Bartling's contentions lack merit.

First, all the causes of action arise from the same facts. Under the substantial evidence test, those facts demonstrate that Bartling held himself out to Wolfe as an expert in aviation insurance. Bartling and Wolfe agreed that Bartling would procure and maintain adequate liability insurance for Wolfe, including through the use of loan arrangements like those involving Imperial. They also agreed that Wolfe would make some payments to Andreini, and Andreini and Bartling would properly account for, monitor, and disburse Wolfe's funds held by Andreini for down payments, monthly payments, refunds to Wolfe, or credits toward additional payments. Likewise, Bartling arranged for credits to Wolfe's accounts, and refunds, to be sent to Andreini, not Wolfe, after which Andreini would periodically account, apply, or refund them to Wolfe. Bartling told Wolfe that insurance could not be retroactively cancelled, that loan companies could issue notices of intent to cancel, but only insurers could actually cancel a policy, and that even then a grace period would exist in which any default could be cured. Bartling's statements that only insurers could cancel policies financed by loan arrangements, and even then only after providing an additional grace period, encouraged Wolfe to communicate only with Bartling and Andreini, not with insurers or loan companies like Imperial, and to rely on Bartling to conduct direct communications with such entities. Bartling and Wolfe agreed that Bartling would monitor Wolfe's policies and use Wolfe's funds on deposit with Andreini to make payments if necessary, and would request additional money from Wolfe if necessary to keep the policies in force. While monthly invoices eventually were sent to and paid directly by Wolfe, Bartling agreed to monitor the policies to assure continued coverage. Wolfe and Bartling agreed to all these conditions because both knew that obtaining and maintaining liability insurance was crucial for Wolfe's business. In exchange for Bartling's conduct, Wolfe agreed to use Bartling as his exclusive agent for all his policies, resulting in Bartling's receiving steady and large commissions over more than a decade.

Bartling properly performed these duties for nearly ten years. However, in this case, Bartling and Andreini failed to properly perform these promised duties. They failed to adequately advise Wolfe what his new payment obligations were under the second policy, or explain how Wolfe's payments had been applied or why Wolfe did not receive the expected October and November invoices. Bartling and Andreini failed to tell Wolfe that he had additional funds available. Even worse, despite Wolfe's repeated requests, Bartling and Andreini failed to provide Wolfe any accounting until after the insurance lapsed. Wolfe repeatedly asked Bartling for an accounting and explanation after receiving the December 29, 1994, notice of intent to cancel. Bartling replied in writing several days later, but before the lapse date, that Wolfe's policy was "in order." After the lapse, Andreini refunded Wolfe $10,000, more than enough to cover the delinquency. Moreover, Andreini never accounted for how the $19,000 credit was applied.

These facts demonstrate there was an enforceable oral contract, with sufficiently defined terms, supported by substantial consideration, which Bartling and Andreini breached. (Civ. Code, §§ 1619, 1621; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677-678; *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 867.) Bartling's and Andreini's argument that the agreement would have obligated them to pay Wolfe's premium is incorrect. Such an advance was not necessary here, since Wolfe had more than enough money in its Andreini account to pay the December 29, 1994, delinquency, and, even if it did not, stood ready to pay additional sums if necessary to maintain coverage. In fact, however, Bartling had at times actually advanced his own funds to cover a payment, with Wolfe quickly reimbursing him. Thus, the parties expected Bartling to do so, and he sometimes did, if doing so was necessary to continue coverage. The parties never contemplated that Bartling would pay premiums or loan installments without reimbursement, and Bartling never did so. In addition, Bartling did not perform all these services for Wolfe as a voluntary good Samaritan, but did so as required by the agreement to secure the continued substantial commissions he continued to receive.

Regarding the breach of fiduciary duty cause of action, a "fiduciary relationship is any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. . . . [Citations.] [¶] Traditional examples of fiduciary relationships in the commercial context include trustee/beneficiary, directors and majority shareholders of a corporation, business partners, joint adventurers and agent/principal. [Citations.] [¶] Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than that required of ordinary contractors." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29-30, emphasis added, internal quotations omitted [contract between author and movie producer requiring producer to account for and pay author a percentage of future profits, while establishing a special relationship and putting burden of production on the producer, did not create a fiduciary relationship].)

Although agents generally are fiduciaries for their principals, an exception has been created for insurance brokers and insurers, who, because of the generally limited nature of their contractual relationship with and obligations to the insured, have been held not to owe a fiduciary duty to their insureds.

"The duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client. [Citation.] [¶] [The insured's] attempt to analogize the broker-client relationship to the attorney-client relationship is wide of the mark. The relationship between an attorney and client is a fiduciary relationship of the very highest character, and attorneys have a duty of loyalty to their clients. [Citation.] Thus, while an attorney must represent his or her clients zealously within the bounds of the law [citations], a broker only needs to use reasonable care to represent his or her client. [Citation.]" (*Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123, emphasis added.)

"The insurer-insured relationship . . . is not a true 'fiduciary relationship' in the same sense as the relationship between trustee and beneficiary, or attorney and client. [Citation.] It is, rather, a relationship often characterized by unequal bargaining power [citation] in which the insured must depend on the good faith and performance of the insurer [citations]. This characteristic has led the courts to impose 'special and heightened' duties, but '[w]hile these "special" duties are akin to, and often resemble, duties which are also owed by fiduciaries, the fiduciary-like duties arise <u>because of the unique nature of the insurance contract</u>, *not* <u>because the insurer</u> *is* <u>a fiduciary</u>.'" (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1150-1151, emphasis added.)

Here, Bartling and Andreini were Wolfe's agents. Normally, the agent/broker finds a policy the broker thinks meets the client's needs, and offers the policy to the client, who makes all payments directly to the insurer, who refunds any overpayments directly to the insured. However, Bartling and Andreini expressly agreed to, and did, assume all the obligations which give rise to a fiduciary duty. They accepted Wolfe's money on all his accounts, negotiated changes in coverage and amounts, applied credits as well as money paid by Wolfe to later payments, and accounted for Wolfe's payments. Defendants frequently applied Wolfe's payments and negotiated new amounts due without Wolfe's prior knowledge or consent, although they later would account for what they did. Unlike the normal agent, Bartling agreed to respond to delinquency notices to assure coverage.

Unlike the normal business, which seeks liability insurance simply to protect against uninsured losses, Wolfe's air customers insisted that it have such coverage as a condition of doing business. Without insurance, Wolfe's lucrative and significant air business would not exist. The crucial nature of this insurance was one of the reasons Wolfe contracted with Bartling to assure uninterrupted coverage.

Here, defendants unquestionably breached this fiduciary duty. They negotiated and executed the second Imperial loan contract without informing Wolfe of its terms. They applied Wolfe's payments to the amount owed Imperial without accounting for or explaining what they did to Wolfe. They never accounted for or explained how the $19,000 credit was used to retire the Imperial loan after the policy lapsed. They repeatedly failed to respond to Wolfe's frantic requests for an accounting, first made in November 1994, and to the December 19, 1994, notice of cancellation.

Finally and perhaps worst of all, their only response to Wolfe, made without performing an accounting of Wolfe's accounts with Andreini or Imperial, was to tell Wolfe, in writing, that its accounts and policies were "in order." These facts provide substantial evidence that defendants breached a fiduciary duty to Wolfe, and committed professional negligence.

Defendants do not seriously dispute that comparative negligence does not apply to offset either contract or negligent misrepresentation damages. Here, Wolfe likewise reasonably relied on defendants' promises to its detriment. We agree with the trial court that Wolfe's comparative negligence should not offset his contract or breach of fiduciary duty damages.

"[T]he [comparative negligence] concept has no place in the context of ordinary business transactions. The modern law of misrepresentation evolved from the 'action on the case of deceit' in business transactions. [Citations.] Business ethics justify reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is on the one who makes a representation. [Citation.] This straightforward approach provides an essential predictability to parties in the multitude of everyday exchanges;

application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity in such transactions." (*Carroll v. Gava* (1979) 98 Cal.App.3d 892, 897.) We conclude that comparative negligence does not affect breach of fiduciary duty or contract damages. Because of our conclusion, whether comparative negligence should offset the damages as to the negligence cause of action is moot.

For all these reasons, we reject Andreini's and Bartling's contentions that insufficient evidence supports Wolfe's causes of action, and that the court erred in not offsetting the damages by Wolfe's comparative negligence.

II

Andreini and Bartling claim there is insufficient evidence that the loss of insurance caused any of Wolfe's damages. They point to their expert's opinion questioning whether Wolfe's figures so proved, and opining that other factors, including business investments, the loss of the FAA certificate, and other possibilities, may also have caused the losses. The contention lacks merit.

"[T]o demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 778.)

"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits [citation] or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled. [Citation.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873-874.)

"Whether a defendant's conduct actually caused an injury is a question of fact [citation] that is ordinarily for the jury. [Citation.] . . . [¶] . . . [C]ausation in fact is ultimately a matter of probability and common sense: '[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case.' [Citation.]" (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 252-253.)

"A plaintiff cannot recover damages based upon speculation or even a mere possibility that the wrongful conduct of the defendant caused the harm. [Citations.] Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. [Citations.]" (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 133.)

Here, Dan Wolfe, McDonnell and Boeing, and the experts all agreed that the loss of insurance caused the damages. Wolfe testified it resulted in substantial and continued loss of business, resulting in persistent and declining profits. McDonnell Douglas and

Boeing agreed that lack of insurance caused the withdrawal of their current and proposed future business. Those losses also led to the bankruptcy-related losses. While the loss of the FAA certificate also may have been involved, Wolfe was not required to show that nothing else had any impact on his losses, only that the insurance loss was a substantial cause of those losses. Viewed under the substantial evidence test, Wolfe did so.

III

Defendants contend some aspects of and the total damages were unreasonable and unconscionable, and awarded because trial court evidentiary errors and bias, and Wolfe's counsel's misconduct during argument, inflamed the jury. Defendants contend the damages awarded exceeded Wolfe's jury request and were grossly disproportionate to the damages evidence. Specifically, defendants allege the trial court made 5 erroneous evidentiary rulings: (1) advising the jury that AAU obtained a $5.6 million judgment against Wolfe, despite the court's admonition that the jury could not consider the judgment for any purpose; (2) precluding evidence that Wolfe's FAA certificate was revoked for safety, not insurance, reasons; (3) permitting Wolfe's damages expert to reverse his deposition testimony that lost business from Boeing was not an item of damages, and testify at trial to substantial lost business from Boeing; (4) permitting evidence of lost business by Wolfe's subsidiary Dan Wolfe Productions; and (5) permitting cross-examination of defendants' liability expert that Wolfe had $19,000 on account at Andreini that could have been used to pay the December 29, 1994, delinquency. Defendants further contend that the court's comments during these exchanges demonstrated bias that prejudiced them.

Defendants also contend Wolfe's counsel's allegedly improper arguments contributed to the excessive damages. Defendants assign as error arguments that Wolfe

(a) faced a $5.6 million judgment; (b) was not seeking damages from losses incurred by other non-aircraft related Wolfe businesses; (c) was not seeking damages for the years lost because of these events; and (d) that Andreini retained $19,000 of Wolfe's money which could have been used to cure the delinquency, and, in arguing so, read from a portion of a witness' deposition that had not been introduced.

Wolfe responds: (1) the court properly told the jury why AAU was not a party to the lawsuit, to avoid confusion over why an obviously interested party was not included in the case the jury was to determine, and admonished the jury not to consider the judgment (defendants do not challenge the court's informing the jury generally about the judgment, but only telling them the amount); (2) since Boeing and McDonnell Douglas representatives both said the primary reason for Wolfe's lost business with them was lost insurance, not the suspended FAA certificates, the trial court properly precluded the evidence as irrelevant, prejudicial to Wolfe, and unduly time consuming (Evid. Code § 352); (3) their expert did not "reverse" his testimony, because his deposition included Boeing in a category of lost business for all companies other than McDonnell Douglas; (4) Dan Wolfe Productions was a subsidiary of Wolfe, owned and run by Mr. and Mrs. Wolfe, with interlocking employees, business, and effort, and thus properly was included in damages although it was not a named party or insured under the AAU policy; and (5) the evidence did show that Wolfe had $19,000 on account with Andreini. Since all the court's rulings were proper, there was no bias.

Regarding its counsel's argument, Wolfe responds that the court sustained objections and admonished the jury regarding the first two challenged statements, curing any harm; there was no error in telling the jury Wolfe was not seeking damages for his lost time; and the argument about the $19,000 was proper and supported by the evidence, defendants did not object to the reading of the unadmitted portion of the deposition, and, in any event, the erroneous deposition reading was harmless because the jury requested and received readback of the properly admitted materials.

Finally, Wolfe points out that the McDonnell Douglas and Boeing representatives testified that Wolfe did or could have done literally hundreds of jobs had its employment continued, providing sufficient support for a lost profits award more than double the total damages actually awarded. Wolfe concludes the jury's failure to award a much higher amount which would have been supported by the evidence shows the award was neither excessive nor based on prejudice, showing that any error was harmless.

We agree with Wolfe and reject defendants' contentions.

"It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice. Then the reviewing court must act. [Citations.] The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule . . . .' [Citation.] All presumptions favor the trial court's determination [citation], and we review the record in the light most favorable to the judgment [citation]." (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259)

First, we agree with Wolfe's final point that the evidence would have supported an award more than double that actually awarded. We reject defendants' argument that there was insufficient evidence that Wolfe could have done that many jobs for McDonnell Douglas and Boeing. The company representatives gave those estimates of how many jobs they expected to do. While the jury could have rejected their testimony, the panel accepted it, and that decision is supported by substantial evidence. The evidence would have supported a much higher award. Thus, even assuming prejudice or error in the challenged rulings or conduct, any error was harmless.

The court repeatedly admonished the jury not to consider the AAU judgment or the award in its determinations. Defendants do not seriously dispute the correctness of telling the jury about the judgment, only its size. Because we assume the jury followed these correct admonitions, the court did not abuse its discretion.

The jury already knew that the crash led to suspension of the FAA permit, and that its absence was not the primary reason for McDonnell Douglas and Boeing canceling their business with Wolfe. Had the court permitted defendants to introduce the excluded evidence, it would have provoked a mini-trial on whether Wolfe was negligent regarding the crash, a completely irrelevant issue in this case. Such a ruling would have greatly prejudiced Wolfe. Again, there was no abuse of discretion.

We agree with Wolfe that its expert did not "reverse" himself by separating Boeing-related damages at trial from the category of all non-McDonnell Douglas losses at the deposition. The expert initially lumped the two categories into one. Moreover, the expert had done additional calculations and taken additional new factors, such as the later McDonnell Douglas-Boeing merger, into account since the deposition. Thus, the expert simply accounted for later developments, and made additional categories at trial. Thus, the trial court properly exercised its discretion.

Likewise, the trial court properly permitted Wolfe to introduce evidence of losses from its subsidiary company, owned and operated by the Wolfes, which did interlocking business with the other Wolfe entities. The mere fact that Wolfe was divided into subsidiaries did not negate the effect of the losses suffered.

Finally, as we have before, we reject defendants' claim that there was no evidence that Andreini retained $19,000 of Wolfe's money. The parties disputed the accounting and amount remaining in Wolfe's account, but substantial evidence from Andreini's lay and expert witnesses supported Wolfe's position.

Because we find no error, we likewise find no evidence of judicial bias.

Regarding the allegedly improper argument of Wolfe's counsel, the court sustained objections and admonished the jury regarding the first two challenged statements. We presume the jury followed those instructions, and, in any event, the court's actions were sufficient to cure any prejudice. The third statement was correct, and we reject defendants' claim that although correct, it was designed to inflame. Finally, the argument about the $19,000 account balance was supported by the evidence, and the erroneous reading of the unadmitted portion of the deposition was harmless, because the additional material was neither new nor prejudicial.

DISPOSITION

We affirm the judgment. Wolfe is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.